In the

Supreme Court of the United States

October Term, 1931

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and HOBOKEN MANUFACTURERS' RAILROAD COMPANY,

Appellants,

against

THE BALTIMORE & OHIO RAILROAD COMPANY, *et al.*,

Appellees.

BRIEF ON BEHALF OF THE HOBOKEN MANUFACTURERS' RAILROAD COMPANY, *Appellant.*

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Hoboken Manufacturers' Railroad Company.



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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and HOBOKEN MANUFACTURERS' RAILROAD COMPANY,

Appellants,

against

THE BALTIMORE & OHIO RAILROAD COMPANY, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF ON BEHALF OF THE HOBOKEN MANUFACTURERS' RAILROAD COMPANY, *APPELLANT.*

Reference to the Official Report of the Opinion in the Court Below.

The opinion of the District Court is reported in *Baltimore & O. R. Co., et al.*, v. *United States of America*, 43 Fed. (2d) 603.

The decisions of the Interstate Commerce Commission which are involved are reported in 132 I. C. C. 579 and 155 I. C. C. 330.

The Grounds on Which the Jurisdiction of this Court is Invoked.

A joint brief was filed by all of the appellants in accordance with paragraph 1 of Rule 12, stating the grounds of jurisdiction.

The decree of the District Court was entered December 19, 1930 (R. 44). The petition for appeal was filed and the appeal was allowed on February 16, 1931 (R. 47, 48).

The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. L. 208, 219, 220, (U. S. C. Supplement III, Title 28, Sec. 47a); and subsection 4, Sec. 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. L. 936, 938, (U. S. C. Title 28, Sec. 345).

Statement of the Case.

This is a suit to enjoin the enforcement of two orders of the Interstate Commerce Commission dated respectively November 5, 1927 (R. 9-13) and May 7, 1929 (R. 14-23), determining and prescribing the reasonable division to be received by the Hoboken Manufacturers' Railroad (hereafter called the "Hoboken") out of a joint through freight rate of $9.00 per 100 pounds provided for shipments of raw silk from Pacific Coast points to New York Harbor destinations. The case was heard by a statutory three-judge court, which entered a final decree enjoining and annulling both of these orders (R. 44). From the judgment of the court below this appeal has been taken.

History of the Proceeding.

The Hoboken is a short terminal or switching railroad operating along the Hoboken waterfront of New York Har-

bor. It has direct rail connection with the Erie Railroad and interchanges freight with other railroads reaching New York Habor (hereafter with the Erie referred to as the Trunk Lines) either through the Erie or by car float (R. 10).

Raw silk imported from the Orient is transported from the Pacific Coast ports to New York Harbor by the various transcontinental railroads (R. 7, 114, 115). Prior to 1926 the silk was delivered at laboratories of the United States Testing Company then located in Manhattan (R. 112). The deliveries were made by the Trunk Lines, the appellees here, at an expense for their terminal services estimated at 31 cents per 100 pounds (R. 82). In 1926 the Testing Company, which tests silk for the silk industry and maintains a textile warehouse (R. 110), moved its plant to a newly-constructed warehouse and laboratory located on the lines of the Hoboken Manufacturers' Railroad in the City of Hoboken (R. 112). To make delivery of silk to this warehouse it was necessary to employ the Hoboken as a terminal or switching carrier (R. 70, 71, 112).

The handling of this silk imposed upon the Hoboken the obligation of performing operations and arranging for new and special facilities with additional expenses not involved in the handling of ordinary freight (R. 73, 74). Since the shipments were less-than-carload shipments, it was the carrier's obligation to unload the silk from the cars and to make delivery through a freight house (R. 71, 72). It was, therefore, necessary for the Hoboken to provide a freight house suitable for the storage of silk prior to delivery and to provide men to unload the silk who were experienced in handling this commodity. Its own freight house not being suitable for the purpose (R. 78), the

Hoboken entered into an arrangement with the Testing Company to provide the necessary space in its new warehouse, to act as the Hoboken's agent to unload the cars with its skilled employees, and to hold the silk until delivery, paying it its actual costs for these services (R. 76, 90). Because of the great value of silk it was also necessary for the Hoboken to provide special guards to protect the cars containing the silk prior to and during the unloading (R. 74, 75); to cover its risk by special insurance (R. 74) and to drop all other work in order to switch these cars promptly when they were delivered to it (R. 105).

By the transfer of the delivery service to the Hoboken the Trunk Lines were thereby relieved of their terminal obligations in connection with the handling of silk, including the necessity of transporting the cars containing the silk across New York Harbor on car floats, and unloading the silk from the cars (R. 78, 79, 117, 120, 154, 160, 167, 168).

As the Commission subsequently found on the evidence produced before it, due to the unusual expenses incident to the handling of silk, the cost to the Hoboken of the terminal service imposed upon it for these silk shipments amounted to 22.23 cents per 100 pounds (R. 11, 18). This figure was made up as follows (R. 191):

	Per Car	Per 100 lbs.
Switching	$14.93	$.0373
Terminal Insurance	45.00	.1125
Policing	5.00	.0125
Unloading and Delivering	24.00	.0600
Total	$88.93	$.2223

Notwithstanding this cost, regardless of the extraordinary character of the freight, and in spite of the fact that the Trunk Lines were, themselves, relieved of a terminal service which had cost them approximately 31 cents per 100 pounds, they declined to allow the Hoboken as its division out of the joint through rate of $9.00 any greater division than that allowed to it from the rates on ordinary less than carload* freight, namely 5¼ cents per 100 pounds (R. 10).

Accordingly, on August 6, 1926, the Hoboken filed its complaint with the Interstate Commerce Commission, under Section 13 of the Interstate Commerce Act, alleging that the division of 5¼ cents per 100 pounds allowed to it out of the joint through rate of $9.00 per 100 pounds on silk was and for the future would be unjust and unreasonable, in violation of Paragraph 4 of Section 1 of the Interstate Commerce Act, and asking an increased division (R. 60). All of the railroads participating in the transportation of the silk from the Pacific Coast ports to New York Harbor were made defendants (R. 55, 56).

At the time this complaint was filed the stock of the Hoboken was owned by the United States (R. 69). Subsequently the stock was sold to private parties (R. 243) and the litigation was continued by the Hoboken under its new owners.

A hearing was held on November 22, 1926, and the evidence taken at this hearing, consisting of 161 typewritten pages of testimony and 8 exhibits, was offered in evidence as an exhibit in the court below and is part of the record here (R. 63-206). This evidence disclosed the above facts and others which will be summarized presently.

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*The silk shipments were less-than-carload shipments (R. 71, 72).

Briefs were filed by all parties, there was a proposed report by the Examiner who heard the case, and oral argument was had (R. 207).

On November 5, 1927, the Commission, by its Division 1, entered its report and order (132 I. C. C. 579). In its report the Commission found that the division received by the Hoboken was, and for the future would be, unjust and unreasonable, in violation of Section 1 (4) of the Act, and that a reasonable division for the future would be not less than 22 cents per 100 pounds (R. 207-211). The Commission also found that the division allowed to the Hoboken had been unreasonable to the extent that it was less than 22 cents on shipments handled by it since August 6, 1926, the date of the filing of the Hoboken complaint (R. 211). On the basis of this report, Division 1 of the Commission issued its first order directing that

> "said complainant shall receive a division of 22 cents per 100 pounds, which division shall be apportioned among all defendants which participate in the revenues derived from this traffic" (R. 212, 213).

The Commission also provided by another paragraph of its order

> "That this order take effect as of August 6, 1926, and shall continue in force until the further order of the Commission". (R. 213.)

Subsequently, this Court announced its decision in *Brimstone R. R. Co.* v. *United States,* 276 U. S. 104, holding that Section 15 (6) of the Interstate Commerce Act did not empower the Commission to require a readjustment of divisions dating back to the time of the filing of the original complaint, except when the rate or rates divided had been

specifically prescribed by it. The $9.00 rate had not been so prescribed and the retroactive feature of its first order was therefore invalid. Accordingly, by an order dated May 14, 1928, the Commission on its own motion reopened the proceeding for further hearing (R. 214).

Such further hearing was had, additional evidence was presented, comprising 79 pages of testimony and 22 exhibits, and various stipulations were made (R. 215-340). Further briefs were filed, there was another Examiner's report and oral argument was had before the entire Commission. Thereafter, on May 7, 1929, the Commission entered its report on rehearing affirming the original finding made by it that the Hoboken was entitled to a division of not less than 22 cents per 100 pounds (R. 341-353) (155 I. C. C. 330). With respect to its first order, the Commission, referring to this Court's decision in the *Brimstone* case, said:

> "The order was, therefore, beyond our jurisdiction in so far as it attempted to prescribe a retroactive adjustment, but it was and is valid as to the future. Its effective date under the circumstances here present must be found to be the date upon which said order could have become effective under the act. By paragraph 2 of Section 15 of the act 'all orders of the commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order.' An order prescribing a division for the future is not an order for the payment of money. Accordingly, the original order prescribing the division for the future should have become effective on December 5, 1927.
>
> Defendants take the position that the facts to which we are required to give consideration under Section 15 (6) of the act were not present in the original

record; that, therefore, the original order herein was null and void; and that any order herein must speak from the date of a final decision upon the entire record. We do not agree with this contention. The former finding as to the future division is amply supported by the evidence upon the original record." (R. 350-351.)

The Commission accordingly entered its second order, dated May 7, 1929, directing:

> "That the said order of November 5, 1927, be and it is hereby modified to read as follows:
>
> *It is ordered,* That on and after December 5, 1927, said complainant shall receive a division of 22 cents per 100 pounds out of the joint eastbound transcontinental rates on silk from points on the Pacific Coast to destinations on the line of complainant at Hoboken, N. J., which division shall be apportioned among all defendants which participate in the revenues derived from this traffic east of Chicago and Peoria, Ill., St. Louis, Mo., and related gateways." (R. 355.)

The appellees and their connections still refused to increase the Hoboken's division in compliance with the Commission's findings and orders, and the Hoboken was subsequently informed that they intended to contest the validity of both orders. To compel compliance with the Commission's determination as to future shipments; to avoid, as applied to such shipments, the questions raised by appellants with respect to the validity of the Commission's first and second orders; and to secure payment without delay of the increased division on such shipments as might move during the pendency of the contemplated litigation, the Hoboken on January 7, 1930, filed with the Commission a motion for a further order which should direct the pay-

ment of the increased division on future shipments but should be in such form as not to be subject to the objections urged against the earlier orders, leaving the prior orders undisturbed, however, as applied to the transactions which they had been intended to cover (R. 356-361). On February 4, 1930, the Commission entered a third order directing that the Hoboken should receive a division of not less than 22 cents on all shipments handled by it on and after March 10, 1930, but directing that its two previous orders should not be considered as modified, amended or rescinded as applied to any shipments transported prior thereto (R. 364-366).

Although the petition in this suit, as filed, attacked the third order as well as the first two, the third order is not now involved in this litigation, the appellees having accepted it (R. 44) and the court having issued its injunction against the enforcement of the first two orders only and having denied an injunction as to the third order (R. 45).

The grounds on which it was alleged in the petition that the first two orders should be annulled may be summarized as follows: first, that the order of November 5, 1927 was invalid because not supported by sufficient evidence and because the Commission failed to comply with the requirements of Section 15 (6) by failing to give due consideration to the factors there specified (Paragraphs 13, 14, 15 of Petition; R. 6, 7); second, that this order was null and void because the Commission attempted to make it applicable to shipments prior to the date of the order and moving on and after the date of the filing of the Hoboken's complaint with the Commission (Paragraphs 7, 8, 9, 10; R. 5); third, that the order of May 7, 1929 was invalid as a retroactive order (Paragraphs 7, 8, 9, 11; R. 5, 6); and fourth, that both of the or-

ders were invalid because they were not limited in their application to transportation moving entirely within the United States, but were applicable also to transportation through Canada (Paragraphs 16, 17; R. 7).

The fourth allegation will not be further discussed in this brief. It was stated by the answer of the Interstate Commerce Commission to the petition that the Commission's order was limited to the prescription of divisions of rates subject to its jurisdiction; that the Commission did not interpret the Act as conferring upon it jurisdiction to prescribe divisions of international joint rates; and that its orders were not intended to prescribe divisions of any joint international rate applicable to transportation conducted partly through Canada (R. 36-37). The answer was accepted by the court below and by the parties as an interpretation and limitation of the Commission's order, and therefore the fourth contention was not further urged.

The court below held that both the first and second orders were null and void and issued its final decree enjoining and setting them aside.

It was the conclusion of the court that the evidence before the Commission as a result of the first hearing, which preceded its decision and order of November 5, 1927, was not sufficient to enable the Commission to meet the requirements of Section 15 (6) of the Interstate Commerce Act and that the order was based principally upon the Hoboken's claim of its need for added revenue without consideration of the revenue needs, efficiency of operation, etc., of the Trunk Lines and transcontinental railroads. On these grounds, as well as on the ground that it was retroactive in effect, the court held that the first order was null and void. No contention was made that the evidence before the Commission as a result of the re-

hearing was insufficient, and it was apparently the opinion of the court below that the evidence before the Commission when it made its second order fully met the requirements of the Act (R. 43). The court, however, having determined that the first order was void, held that the second order was null and void in its entirety as a retroactive order because it attempted to relate back to and correct the first order.

Questions Presented.

On these facts, the questions to be determined are:

1. Did the court below err in concluding that the evidence before the Commission on the first hearing was insufficient and that the Commission failed to comply with the provisions of Section 15 (6) of the Interstate Commerce Act.

2. Did the court below err in enjoining the Commission's first order (November 5, 1927) in so far as it applied to and determined the future just and reasonable division to be received by the Hoboken because the Commission at the same time attempted to require a retroactive readjustment of divisions.

3. Did the court below err in enjoining in its entirety the second order of the Commission (May 7, 1929) because by that order the Commission undertook to amend or correct the form of its first order.

The Evidence on the First Hearing Before the Commission.

The facts already stated (*supra*, pp. 2 to 5) were developed by the evidence at the first hearing. This evidence may be further summarized as follows:

Value of Silk.

Forty thousand pounds of silk on the average were loaded in a car (R. 82) and the value of this silk was approximately $300,000 (R. 103).

The Freight Rate on Silk.

A rating of one and one-half times first class is provided in the carriers' tariffs for silk handled in ordinary freight train service. For this imported silk, however, when handled in special trains approximating passenger train time, a much higher rate of $9 per 100 pounds is published from the Pacific Coast ports to New York (R. 135, 136).

Operations of the Transcontinental and Trunk Lines in Handling Silk.

The silk is imported through Pacific Coast ports. The routing of the silk is left largely to the steamship companies (R. 115). It is brought across the continent in trainloads (R. 116), which because of the value of the silk, are transported at very high speeds approximating passenger train time (R. 102, 113, 136). The transcontinental lines provide heavily armed guards for these trains (R. 102) and protect themselves by insurance (R. 102, 173). The Erie Railroad, for example, provides about one watchman to a car. When the cars reach Jersey City, the Erie provides a special movement in order to deliver them to the Hoboken and get rid of the silk as quickly as possible (R. 158).

The Switching Operations Performed by the Hoboken, on Silk Shipments.

Because of its great value and the risk involved in handling silk, the Hoboken drops its other operations when a car of silk is delivered to it in order to switch the car at once and place it for unloading (R. 74, 75, 105). It is necessary to keep a track open for the purpose in order to accomplish fast, prompt delivery (R. 85). The cars containing the silk are switched to the plant of the Testing Company where the silk is unloaded, and the empty cars are then returned to the Erie (R. 71).

The operations involved in the interchange of silk between the Erie Railroad and the Hoboken and the switching operations of the Hoboken in handling silk were described in detail and were compared with the operations involved in the handling of other freight (R. 71, 74, 75, 86, 87, 88, 92, 97, 98, 104-108, 157-165).

Guards Furnished by Hoboken.

The Hoboken places guards around the cars, four men usually being assigned to protect the silk (R. 74). The expense of this policing is not incurred on other classes of freight (R. 74).

Unloading, Storage and Delivery of Silk by the Hoboken Through the Agency of the Testing Company.

The rate charged on the silk is an any-quantity rate (R. 77) and the shipments are less-than-carload shipments, so that it is the Hoboken's obligation under the tariffs to unload the silk from the cars, store it during the period of free time, and make delivery to consignees through a freight house (R. 71, 72).

The Hoboken's own freight house, located at 5th Street, Hoboken, is not suitable for the handling and protection of silk (R. 78). Because of the inadequacy of its own facilities, the Hoboken has made arrangements with the Testing Company to act as its agent to unload the shipments with its employees, skilled in the handling of silk, to provide storage space in its warehouse for the silk during the period of free time, and to make delivery of the silk as the Hoboken's agent (R. 76, 90). The Hoboken remains liable for the silk as a common carrier during the period of forty-eight hours free time (R. 91).

Insurance Carried by the Hoboken on Silk.

The insurance carried by the transcontinental and Trunk Lines expires when the silk is unloaded from the cars (R. 173). Because of the high value of the silk and the risk of handling it, it was therefore necessary for the Hoboken to protect itself by special insurance covering the period that the silk is in its possession as a common carrier. The expense of this insurance is an expense not incurred in connection with the handling of other freight (R. 73, 74).

The Cost to the Hoboken of Handling Silk and Amount Required to Pay Its Operating Expenses, Taxes, Etc.

As already stated, the cost to the Hoboken for switching, insurance, policing and unloading and delivering was shown to be $88.93 per car or 22.23 cents per 100 pounds (R. 72, 191). These figures represent only actual costs and include nothing for profit or return on investment. It was testified in great detail how these various items of cost were made up (R. 72-76, 88-90). It was testified that the

totals from which these figures were computed included taxes of $45,806, rentals of $30,908, maintenance of way and structures $25,875, and other items, the figures for which were given (R. 89, 90).

THE EXPENSE TO THE TRUNK LINES OF MAKING DELIVERIES THEMSELVES TO MANHATTAN OF WHICH THEY ARE RELIEVED WHEN DELIVERY IS MADE BY THE HOBOKEN.

When the silk is delivered by the Erie on Manhattan Island the car has to be switched out of the train at Jersey City, placed on a carfloat and floated over to New York (R. 160). A special float movement would be made for only one or two cars (R. 164). The Trunk Line then unloads the silk from the car and makes delivery (R. 162, 163). When delivery is made through the Hoboken, the Trunk Line is not concerned with any unloading expense. It simply leaves the cars on the interchange track of the Hoboken (R. 161).

The Assistant to the Vice-President of the Erie Railroad agreed that the delivery of silk by carfloat at the water terminals in New York City is claimed by the Trunk Lines to be more expensive than any other deliveries (R. 167). The cost to the Trunk Lines of making delivery of silk by carfloat to Manhattan, a service which they had formerly performed before the delivery was made by the Hoboken, was computed as $124 per car, $6.20 per ton, or 31 cents per 100 pounds. The details of the computation were testified to at length (R. 79-82).

THE DIVISION OF THE RATE BETWEEN THE WESTERN TRANSCONTINENTAL LINES AND THE EASTERN TRUNK LINES.

Of the $9 rate, the lines east of Chicago receive 27.5 per cent., or $2.475 per 100 pounds. The western lines

receive 72.5 per cent., or $6.525 per 100 pounds (R. 135, 136).

The Division Allowed to the Hoboken on Silk.

In spite of the fact that the Hoboken's cost of handling the silk was 22.23 cents per 100 pounds, and notwithstanding that if the Trunk Lines had allowed the Hoboken its full cost as its division, the terminal expense to the Trunk Lines would have been about 9 cents less than the expense which they had incurred in making delivery of silk themselves, they allowed the Hoboken only $1.05 per ton or 5¼ cents per 100 pounds, this being the division allowed to it on ordinary less-than-carload freight (R. 71). The Hoboken therefore was compelled to incur a loss of approximately 17 cents per 100 pounds on all the silk delivered to it by the Trunk Lines.

Financial Data as to the Transcontinental and Trunk Lines.

Besides the evidence above outlined, indicating that after allowing the Hoboken a division sufficient to pay its costs, the handling of the silk by the Hoboken would result in increased revenue of about 9 cents per 100 pounds to the Trunk Lines from the silk shipments, there were introduced in evidence two exhibits. One showed railway revenues and expenses of the railways and large switching and terminal companies of the United States for 1925 and 1926 showing a substantial increase in most items in the latter year over the former and showing the rates of return of the carriers in the eastern and western districts respectively, in which districts the defendants were among the principal lines (R. 199). The other showed for individual rail-

roads in the western region their property investment, net railway operating income and rate of return (R. 201).

Comparisons with Other Terminal Lines.

There was detailed evidence as to the allowances paid to other terminal lines in New York Harbor and elsewhere and the services covered by them, with which the allowance to and operations of the Hoboken were compared (R. 150-157, 169-171, 203).

The transcontinental lines and railroads in the western district are not concerned with and have no knowledge of the subdivisions of portions of the through rates accruing to the lines east of Chicago. They assume the divisions paid to the terminal lines connecting with them, and expect the eastern roads to assume the divisions of terminal lines with which the latter connect (R. 134). In 1922, the eastern lines' division of the through rate was increased from 25 to 27.5 per cent (R. 135). One of the reasons for this increase was the terminal costs at the Atlantic seaboard (R. 137).

Importance of the Continued Operation of the Hoboken to the Community Served by it.

A witness for the Hoboken Chamber of Commerce testified that this organization considers the Hoboken an essential factor in the commerce and industry of the City of Hoboken. It is the only rail service maintaining direct connection with the piers of twelve ocean steamship lines, the factory buildings housing several industries, and the two largest warehouse developments in the city. It occupies a strategic position along practically the entire waterfront of Hoboken "and the industries locating on this waterfront in the future will be dependent upon the con-

tinued operation of the Hoboken Manufacturers' Railroad" (R. 132).

The Evidence on the Second Hearing.

The evidence taken at the further hearing included evidence produced by the Hoboken to show that the method of handling silk and the cost to the Hoboken of the service performed by it on silk shipments remained the same as testified to at the original hearing (R. 236). There was testimony that the Trunk Lines were also making delivery at their own float stations (R. 249). There was testimony as to the book and appraised value of the Hoboken properties (R. 283-285-287-289). It was shown that even with the increased division determined by the Commission, the net income of the Hoboken for the first five months of 1928 was only $23,000, as compared with a net income of $123,000 necessary to afford a return of 5¾ per cent. of the value of its property (R. 289-290). There was then shown an analysis of the silk shipments, indicating that there were on an average seven separate shipments in each car (R. 317). The revenue remaining to the transcontinental and trunk line carriers on the $9.00 rate on silk after the payment of a division of 22 cents to the Hoboken was compared with the revenue received by these lines from the transportation of other freight. It was shown that silk shipments under the $9.00 rate produced average freight charges of $3,617.24 per car, as compared with earnings received by the transcontinental lines under rates on many other kinds of freight averaging only $443 per car for shipments from the Pacific Coast ports to New York Harbor (R. 317, 327). There was evidence that after a division of 22 cents to the Hoboken, the earnings remaining to the transcontinental lines

from the $9.00 rate on silk were many times greater than their earnings for handling transcontinental shipments of highly perishable fruits and vegetables or from the transcontinental transportation of passengers (R. 329, 331, 337). There were also financial statistics as to the various transcontinental and Trunk Lines compared with similar statistics for the Hoboken and showing that from all of its traffic the Hoboken earned a much lesser return on its investment than all but one or two of the large railroad lines (R. 333, 339).

Finally, a stipulation was entered into that all of the railroad parties to the proceeding were efficiently operated, were of importance to the public, and that their continued operation was in the public interest (R. 256).

Specification of the Assigned Errors Intended to be Urged.

This appellant intends to urge all of the errors assigned as follows (R. 46, 47):

The District Court erred:

1. In setting aside, annulling, and permanently enjoining the Commission's orders of November 5, 1927, and May 7, 1929.

2. In holding that the Commission's order of November 5, 1927 was void because not supported by sufficient evidence.

3. In holding that the testimony offered at the hearing which preceded the Commission's orders of November 5, 1927 "fell far short of a compliance with the terms of the act".

4. In holding that the Commission's order of November 5, 1927 was based "so far as the Hoboken Railroad's interests were concerned, upon the allegation that the railroad needed the additional revenue".

5. In holding that the Commission's order of November 5, 1927 was made "without any reference to the services performed by the trunk lines, or their condition, efficiency, and need of revenue".

6. In not holding that the order of November 5, 1927 constituted a valid determination of the future just, reasonable, and equitable division to be received by the Hoboken Manufacturers' Railroad Company.

7. In not holding that the order of November 5, 1927, was a valid order in so far as it fixed the just, reasonable, and equitable division to be received by the Hoboken Manufacturers' Railroad Company on and after thirty days from its date, or December 5, 1927.

8. In holding that the Commission's order of May 7, 1929, because of the absence of evidence required by the applicable statute to support it, as well as because of its retroactive feature, was null and void.

9. In holding that the Commission's orders of November 5, 1927 and May 7, 1929 were "made in the absence of certain evidence necessary to be considered by the Commission in fixing such rates (divisions), and therefore failed to meet the statutory requirements".

10. In not holding that the Commission's order of May 7, 1929, which corrected or modified the order of November 5, 1927 so as to make the latter order effective December

5, 1927 instead of August 6, 1926, was a valid order and that it was within the power of the Commission and proper by its order of May 7, 1929 to correct or modify its order of November 5, 1927 so as to change the effective date thereof from August 6, 1926 to a date thirty days subsequent to the date of the order of November 5, 1927, or December 5, 1927.

11. In not dismissing the petition.

Summary of Argument.

POINT I. The Commission, in making its order of November 5, 1927, fully complied with the requirements of Section 15 (6) of the Interstate Commerce Act as to the matters to be considered by it and this order, being one as to the division to be received by the Hoboken out of the joint through rate for the transportation of one commodity alone, silk, was amply supported by substantial evidence, including sufficient evidence on the matters specified in Section 15 (6).

A full hearing was accorded.

Section 15 (6) requires "due consideration" of the factors specified. Whether this was accorded depends upon the sufficiency of the evidence before the Commission.

(*a*) The weight to be given to the evidence and conclusions to be drawn therefrom were matters for the Commission to determine and its determination is not subject to review.

Western Paper Makers' Chemical Co. v. *United States*, 271 U. S. 268, 271;

Int. Com. Comm. v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547.

The Commission's findings that the Hoboken's cost of handling silk included items for insurance carried by the Hoboken and for compensation paid to the United States Testing Company for acting as the Hoboken's agent being amply supported by the evidence, are not subject to review and the case must be decided in the light of the Commission's finding as to the Hoboken's cost of handling the silk traffic.

(*b*) Distinguishing features of this case bearing upon the question whether Section 15 (6) was complied with.

The case involves the determination of the division of a rate on a single commodity and not a general revision of divisions on all freight.

The division formerly allowed to the Hoboken, which was complained of, represented only one-fourth of the Hoboken's cost of handling the traffic, and it was not contended by the appellees and their connections that the remainder of the rate left to them would be non-compensatory after deducting the division found reasonable by the Commission for the Hoboken.

There was no contention that the evidence which was claimed to be lacking would have required a different conclusion, and the Commission's affirmance of its original decision after the rehearing negatives such a contention.

(*c*) The record before the Commission on the first hearing included substantial evidence with respect to the factors specified in Section 15 (6) in so far as they were pertinent to the division to be received by the Hoboken from the $9 rate for the transportation of silk.

Efficiency of Operation.

The best proof of efficiency of operation is a description of the operations, from which the Commis-

sion can conclude whether or not they were efficiently performed.

The evidence fully indicated the services of the transcontinental lines and the expedited service accorded to the silk in transporting it from the Pacific Coast and the operations of the Hoboken in handling silk were described in detail. The Commission expressly considered the question of the efficiency of the Hoboken's arrangements in connection with silk.

Revenue Requirements.

The record before the Commission contained exhibits of financial statistics, expenses and revenue needs of the carriers in the eastern and western regions embracing the appellees and their connections. The evidence also showed that the Trunk Lines would benefit financially by the arrangement with the Hoboken because the Hoboken's service was a substitute for a service which had cost the Trunk Lines 31 cents per 100 pounds.

So far as the Hoboken was concerned, the evidence showed that the division allowed it by the Trunk Lines for handling the silk was 5¼ cents and that the cost to the Hoboken for this handling was 22.23 cents. The details of this figure, the taxes, operating expenses, rents, etc., of the Hoboken were shown.

Importance to the Public.

There was evidence as to the necessity of the continued operation of the Hoboken for the service of the City of Hoboken and the industries and steamship piers there located.

The Commission is entitled to take judicial notice of the importance to the public of the continued operation of the large Trunk Lines.

WHETHER AN ORIGINATING, INTERMEDIATE OR DELIVERING LINE.

The record contained evidence as to the handling of silk, showing that the lines on the Pacific Coast were the originating lines, the Trunk Lines and other transcontinental lines were the intermediate lines, and the Hoboken was the delivering line.

ANY OTHER FACT.

There was substantial evidence as to the characteristics of silk; the expenses incurred by the Hoboken in the handling of it which are not incurred in the handling of ordinary freight and which have no relation to the mileage haul of the Hoboken; the divisions paid to other terminal lines, and their services; the history of the divisions, etc.

(*d*) To hold that in this case, involving the Hoboken's division of the rate on silk alone, this evidence failed to satisfy the requirements of Section 15 (6) would involve a disregard of the words "due consideration" and require an unreasonable construction of the statute.

The statute should be construed as meaning that consideration of the factors specified is "due" only in so far as they may be pertinent to the issues before the Commission and helpful to it in determining those issues.

In a case involving the division of a single rate on one commodity, evidence as to the factors specified in Section 15 (6) with respect to the general operations of the railroads and revenues from all traffic is not pertinent, and evidence as to such factors can be pertinent only in so far as they relate to the transportation of the one commodity involved. The decisions in *Brimstone R. R. Co.* v. *United States*, 276 U. S. 104, *U. S.* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, and *New England Divisions Case*, 261 U. S. 184, are distinguish-

able because they involved a readjustment of divisions on all freight, but the views there expressed support the contention here as to the proper interpretation of Section 15 (6).

The difference between the character of evidence which is pertinent in a case involving the division of a single rate on a single commodity and that which is pertinent in a case involving a general readjustment of divisions on all freight is similar to the difference between the evidence which is pertinent to the determination of a reasonable rate on one commodity and the evidence which is helpful to the Commission in prescribing a general readjustment of all rates for revenue purposes.

Beaumont, Sour Lake & Western Ry. Co. v. *United States*, 282 U. S. 74.

Evidence as to general financial needs of a railroad or general operating efficiency is not helpful or pertinent in determining the reasonableness of an individual rate.

Int. Com. Comm. v. *Union Pacific R. R. Co.*, 222 U. S. 541;

Dayton-Goose Creek Railway Co. v. *United States*, 263 U. S. 456, 482.

(*e*) This contention is borne out by a consideration of the purposes of Section 15 (6).

Section 15 (6) in its present form was part of the Transportation Act and was designed to afford the machinery for carrying into effect the provisions of that act for distributing the railroad funds raised under the rate-making provisions of the act, Section 15 (a).

New England Divisions Case, supra.

Formerly the Commission determined reasonable

divisions of individual rates in the light of facts similar to those considered by it here.

Stonega Coke & Coal Co. v. *B. & N. R. R. Co.*, 39 I. C. C. 523.

In view of its purpose, Section 15 (6) should be construed as enlarging rather than as restricting the power of the Commission.

POINT II. Since the Commission, in making its determination and order of November 5, 1927, complied with the requirements of Section 15 (6) with respect to the matters to be considered by it, its decision and order constituted a valid determination of the future just, reasonable and equitable division to be received by the Hoboken, and its order was a valid order in so far as it fixed the division to be received by that company on and after thirty days from its date, or December 5, 1927.

While so much of the Commission's first order as directed that it should take effect on August 6, 1926 was invalid, the Commission made a finding of the reasonable division to be received by the Hoboken for the future and its order prescribed the division for the future. The invalid portion was separable and the court therefore erred in enjoining the order in its entirety and in not enjoining it only in so far as it attempted to operate retroactively.

Int. Com. Comm. v. *Diffenbaugh*, 222 U. S. 42, 49.

Chicago & A. R. Co. v. *Interstate Commerce Commission*, 173 Fed. 930 (reversed on other grounds in *Interstate Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452).

Chicago, M., St. Paul & P. R. Co. v. *United States*, 33 Fed. (2d), 582.

At most, since the order was valid for the future, the invalidity of the last paragraph made it an order issued without an effective date named therein and it therefore took effect on the earliest date when under the Act it could become operative, namely, thirty days from its issuance.

Interstate Commerce Act, Section 15 (2).

It was analogous to a legislative act without an effective date, which takes effect upon passage or upon the earliest date permitted by constitutional provisions.

Prentis v. *Atlantic Coast Line*, 211 U. S. 210, 226.
Terminal Railroad Assn. v. *United States*, 266 U. S. 17, 30.
Matthews v. *Zane*, 7 Wheat. (U. S.) 164, 211.
State ex rel. v. *Milroy*, 88 Ohio 301.
Ross v. *New England Mortgage Security Co.*, 101 Ala. 362.

POINT III. The Commission in making its order of May 7, 1929, fully complied with the requirements of Section 15 (6) of the Interstate Commerce Act as to the matters to be considered by it, and this order was amply supported by substantial evidence including sufficient evidence as to the matters referred to in said section.

The court below so determined.

POINT IV. The Commission's order of May 7, 1929 properly amended its former order of November 5, 1927, so as to make the latter order effective December 5, 1927, instead of August 6, 1926.

Section 16 (a) of the Interstate Commerce Act authorizes the Commission to reverse, change or modify its original orders.

L. & N. R. Co. v. *Sloss-Sheffield Co.*, 269 U. S. 217; *Pennsylvania R. Co.* v. *United States*, 288 Fed. 88.

This is also contemplated by Section 15 (2).

Since the first order was valid as to the future and under the law should take effect as of thirty days from its date, it was within the power of the Commission by its second order of May 7, 1929 to correct or amend the first order to read as it should have read originally.

The original order was not set aside by the Commission when it granted the rehearing, and therefore remained within its control.

During the entire period following the first decision, the appellants and their connections were violating the Interstate Commerce Act in not maintaining just and reasonable divisions on the transportation of silk. The Commission's first order was designed to prevent such violation and require compliance with the statute. After the rehearing, it affirmed its original decision and its second order was designed to correct the form of the first order to make it accomplish this purpose. It was within the Commission's power to do this.

Section 15 (6) does not except orders fixing divisions from the operation of the general provision of the Act such as Sections 15 (2) and 16 (a).

The decision in the *Brimstone* case with respect to the lack of power of the Commission to make a retroactive order relating to divisions does not apply to an order merely correcting a previous order, issued after full hearing.

POINT V. The order of May 7, 1929 was a valid order for the future.

Even if, contrary to the foregoing contention, the second order was invalid in so far as it modified the

first order, nevertheless, being supported by ample evidence, it constituted a valid determination of the Hoboken's division for the future.

POINT VI. The judgment of the court below should be reversed.

ARGUMENT.

POINT I.

The Commission, in making its order of November 5, 1927, fully complied with the provisions of Section 15 (6) of the Interstate Commerce Act as to the matters to be considered by it; and this order, being one as to the division to be received by the Hoboken out of the joint through rate for the transportation of one commodity alone, silk, was amply supported by substantial evidence, including sufficient evidence on the matters specified in Section 15 (6).

Section 1 (4) of the Interstate Commerce Act (41 Stat. L. 474) provides:

> "(4) It shall be the duty of every common carrier subject to this chapter * * * in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers."

Section 15 (6) of the Interstate Commerce Act (41 Stat. L. 484) is as follows:

> "(6) Whenever, after full hearing upon complaint

or upon its own initiative, the commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the commission shall by order prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. *In so prescribing and determining the divisions of joint rates, fares and charges, the commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.*" (Italics ours.)

No contention is made that a "full hearing" was not had, as required by this section, but the court below held that the Commission failed to comply with the provisions in italics.

The requirement of the statute is that "*due* consideration" be given to the factors specified. The first question here presented, therefore, is whether the Commission accorded such due consideration in this case. The determination of the latter question in turn depends upon the sufficiency of the evidence before the Commission, since it is not contended, and the court below did not find, that the Commission failed to give due consideration to all the evidence in the record before it.

We submit that the evidence in the present record satisfied the requirements of the statute and that there is nothing in the decisions of this Court requiring the conclusion that under the circumstances of this case such evidence was insufficient to enable the Commission to reach a determination.

A. The weight to be given the evidence and the conclusions to be drawn therefrom were matters for the Commission to determine, and its determination is not subject to review.

This point is so well settled by the decisions of this Court that no further argument upon it is necessary.

Western Paper Makers' Chemical Co. v. *United States*, 271 U. S. 268, 271;
Int. Com. Comm. v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547.

Indeed, the point would not be mentioned at all were it not that in the court below, the appellees again suggested

the contention urged by them before the Commission (R. 210) and rejected by it (R. 211), that the items of the Hoboken's expense resulting from its arrangement with the Testing Company and from its insurance policy were not properly to be included in determining the Hoboken's total cost of handling the silk shipments.

The Commission upheld the arrangement with the Testing Company, saying (R. 209):

> "Complainant states that its warehouse is not adequate to store the silk nor is its labor sufficiently skilled to unload or otherwise handle it. For those reasons it is necessary to employ the Testing Company to unload, store, and deliver the silk to consignees."

And with respect to the insurance, the Commission in its report found (R. 211):

> "The costs of handling silk over that of handling other traffic are shown by complainant to be the cost of terminal insurance, policing, unloading, storing and delivering. There can be no doubt of the increased risk in handling silk, and in the interest of efficient and economical operation, the necessity for insurance and policing is obvious."

There being a very considerable amount of evidence upon these features, the Commission's findings under the principle of the decisions above cited are clearly conclusive, whether or not the court might itself be disposed to reach a different conclusion on the evidence.

As Mr. Justice BRANDEIS said in the opinion of this Court in *New England Divisions Case*, 261 U. S. 184, at p. 204:

> "To consider the weight of the evidence, or the wisdom of the order entered, is beyond our province.

Manufacturers Ry. Co. v. *United States*, 246 U. S. 457; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62."

As a matter of fact, we believe that a reading of the record before the Commission clearly indicates that no other conclusion was possible as to the expense incurred by the Hoboken in handling silk than that reached by the Commission.

Therefore these findings of the Commission are to be accepted as part of the background in the light of which the question here considered must be determined.

B. Distinguishing features of this case bearing upon the question whether Section 15 (6) was complied with.

The following features of the proceeding before the Commission, we submit, have an important bearing upon the question of the sufficiency of the evidence presented at the first hearing:

1. The proceeding concerns the division of but one rate on one particular commodity and was not a proceeding for a general revision of the divisions to be received by a carrier or group of carriers out of all of their rates on all freight. In this respect the present case differs from other proceedings, in which the Commission's orders have been passed upon by this Court in decisions relied upon by the appellees and the court below, which will be discussed later.

2. The Hoboken's complaint to the Commission sought an increase only in the division received by it, and there was before the Commission no question of a revision of

the divisions received by all the several carriers participating in the transportation.

3. The commodity upon which this rate applied—silk—was one of unusually high value as compared with ordinary freight, and the handling of this extraordinary commodity involved special services and unusual risks and expenses for the Hoboken as terminal carrier.

4. The joint through rate out of which the Hoboken sought an increased division was an unusually high rate ($9.00 per 100 pounds compared with rates of from $.90 to $4.95 on many other articles (R. 326-331)).

5. Notwithstanding these facts, the appellees and their connections allowed the Hoboken a division out of this rate no higher than the division allowed to it out of the joint rates on ordinary freight.

6. This division, which the Hoboken sought to have increased, was only about one-fourth of the cost to it of the terminal service performed by it with respect to this silk, as shown by the evidence at the first hearing (R. 191) and as found by the Commission (R. 209). This fact distinguishes the present case from other cases which have been before this Court involving orders of the Commission prescribing divisions, since this is the first case to come before this Court where the division sought to be changed by the Commission's order was shown to afford less than the cost of handling the traffic covered by the rate and therefore to be confiscatory.

7. It was not contended by the appellees that the balance of the rate remaining to them and their connections

after deducting the increased division prescribed for the Hoboken was or would be non-compensatory or inadequate.

8. The Hoboken is a short switching line performing only a terminal service with respect to this silk, and its services and costs could in no way depend upon the general financial condition, efficiency of operation, etc., of the large transcontinental lines, many of them a thousand miles away. Nor could it have knowledge of these facts.

The foregoing features of this proceeding are important here because, as we contend, if the language of the Act is to be properly and reasonably interpreted, the character and extent of the evidence which must be before the Commission and which it is required to consider in any individual case must depend upon the nature of the issues before it and the particular circumstances of that case: Otherwise, we submit, the words "*due* consideration" will not be given their true significance.

It is to be noted further, as will later be more fully pointed out, that most of the evidence which the court below apparently considered lacking (erroneously as we contend), was evidence as to the appellees and their connections, which was naturally easily available to them and the production of which would have imposed a great burden on the Hoboken. It is submitted that the appellees, who had every opportunity to produce the evidence, should not be permitted now to defeat the Commission's order by the plea that this evidence was lacking.

Oregon R. R. & N. Co. v. *Fairchild*, 224 U. S. 510, 526, 527.

Further than this, however, it is not contended that the evidence which it is claimed was lacking on the first hearing, would, if it had been produced, have required a different conclusion. Indeed, the very fact that after the second hearing, when it was the view of the lower court that the evidence was sufficient, the Commission affirmed its original decision, negatives any such contention.

C. The record before the Commission on the first hearing included substantial evidence as to the factors specified in Section 15 (6) with respect to the division to be received by the Hoboken from the $9.00 rate for the transportation of silk.

The $9 rate on silk was a rate voluntarily established by the carriers. It was, therefore, presumably compensatory for the entire transportation. On the other hand, the share of this rate allowed to the Hoboken represented only one-fourth of the cost of its portion of the transportation services. It was plainly confiscatory and was therefore not a division that the Commission could have prescribed. The 22-cent division which the Commission fixed was barely enough to meet the Hoboken's cost of handling the silk. And it is not claimed that the balance of $8.78 was non-compensatory to the appellees and their connections. Such a contention cannot be advanced here.

Beaumont, Sour Lake & Western Ry. Co. v. *United States*, 282 U. S. 74, 79.

The proof of these facts alone, should, we submit, be sufficient to sustain the Commissions order in a proceeding involving the division of a single rate on one commodity. But further than this, we submit that if Section 15 (6) be

construed as also requiring, in such a case, consideration of evidence as to each of the particular factors specified therein, the court below erred in holding that such evidence was lacking here. These factors will be considered in order.

Efficiency of Operation.

The first item specified in Section 15 (6) is "the efficiency with which the carriers concerned are operated."

The record before the Commission on the first hearing showed in detail the way in which silk was being handled by the Hoboken. There were descriptions of the Hoboken's operations on other freight. There was evidence as to the way in which the transcontinental lines and the Hoboken's connections handled silk. It was testified that the silk was transported practically in passenger service, in trainload lots from the Pacific Coast to Hoboken. There was testimony as to the guarding of the silk in transit, as to the insurance placed thereon by the various carriers to cover their risks, and opinions as to whether their practices in these respects constituted efficient operation in the handling of the silk traffic. The very words "efficient operation" occurred several times in the record of the first hearing.

For example, there was a question whether it was efficient operation for the Hoboken to employ the Testing Company to handle this silk.

> "Q. (Mr. Carmalt): The facility that is there offered is convenient for an efficient operation?
> A. (Mr. O'Neal): It is." (R. 85.)

Again:

> "Q. (Mr. Carmalt): Are you able to judge on the question of whether or not the service that is given by

that road on that traffic is as efficient as the other roads in the region?

A. (Mr. O'Brien): We have been highly commended by the other roads on the way we have handled the cars * * *." (R. 107.)

There was testimony as to whether from the standpoint of the Trunk Lines it was efficient operation to have the silk delivered by the Hoboken rather than transported across the Hudson River for delivery at their own terminals (R. 113, 114, 116).

What is evidence of efficiency of operation if it is not descriptions of how the operations are performed, from which the Commission can itself decide whether the freight is being economically and efficiently handled? And of such descriptions there was no lack (see *supra*, pp. 12-14).

That the Commission particularly considered the element of efficiency is indicated by its report, in which it reviewed the evidence of how this silk was handled. Among other things the Commission said:

> "There can be no doubt of the increased risk in handling silk and in the interest of *efficient and economical operation* the necessity for insurance and policing is obvious." (Italics ours.) (R. 211.)

Revenue Requirements.

The next item is "the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railroad property held for and used in the service of transportation".

An exhibit marked Exhibit No. 4 (R. 199) was put in evidence, which showed the operating revenues and expenses and taxes of all the railroads of the country by

regions for the year 1925 and the first eight months of 1926, together with the rates of return on their property. Another exhibit, Exhibit No. 5 (R. 201), showed more detailed evidence as to financial operations and needs of the western carriers. With these figures before it the Commission could certainly conclude that the Trunk Lines and transcontinental lines as a whole were not in such desperate financial condition that they could not afford to accord to the Hoboken 17 cents more per 100 pounds for the handling of silk, to enable the Hoboken to meet the costs of this handling, especially when the $9 rate had been voluntarily established and maintained and when there was and could obviously be no claim that the balance of the rate remaining to the transcontinental and Trunk Lines was confiscatory.

In this connection, attention is again directed to the evidence that if the silk were not delivered to consignees by the Hoboken, delivery would have had to be made by the Trunk Lines themselves or through other terminal companies, and that the expense of deliveries by the Trunk Lines themselves would probably be greater than the increased division to the Hoboken (R. 82). This was something which the Commission had before it, bearing upon the revenue effect of the arrangement with the Hoboken, so far as the Trunk Lines were concerned.

From the standpoint of the Hoboken, there was evidence as to its switching expenses, its taxes, rents, and special expenses in the handling of silk. There was certainly proof of its need for added revenue from the transportation of silk, since there was extensive and convincing evidence that it cost the Hoboken 22.23 cents per 100 pounds to handle the silk (see *supra*, pp. 4, 14, 15) and that

the Trunk Lines allowed it a division of only 5¼ cents. It is well settled that, regardless of its total financial condition, a carrier cannot be required to transport a given commodity at less than cost (*Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585) and with its existing division amounting to only one-quarter of its operating cost of handling the traffic, without reference to a fair return on its investment, the Commission was plainly entitled to consider this fact as proof of the Hoboken's need for additional income on this traffic. Bearing in mind that "The 1920 Act (of which Section 15 (6) was a part) sought to ensure, also, adequate transportation service", as this Court said in the *New England Divisions Case, supra*, p. 189, it is obvious that the evidence as to the Hoboken's costs constituted proof for the Commission to consider that the silk traffic, under the division complained of, was not promoting the ability of the Hoboken to serve the public adequately.

Indeed, it was apparently the opinion of the court below that the Commission gave too much consideration to the financial requirements of the Hoboken, for it said:

> "It (the order) seems to have been based altogether, so far as the Hoboken Railroad's interests were concerned, upon the allegation that the railroad needed the additional revenue, * * *. In other words, its point of view was essentially parochial * * *" (R. 41.)

To the extent that it was the view of the court that the increased division was prescribed solely because of the Hoboken's need of additional general revenue, we think it erred. But the need for added revenue *from the silk traffic*, to meet the cost of handling that traffic, was undoubtedly

considered and recognized by the Commission. And we submit that this, together with the foregoing evidence as to the Trunk Lines and transcontinental lines, met the requirement of this item of the statute in a case involving the division of a rate on silk alone.

Importance to the Public.

The third item specified in Section 15 (6) is the "importance to the public of the transportation service of such carriers".

The Hoboken is a small railroad, less well known than the large transcontinental lines. Therefore evidence as to its importance was produced (R. 132) in the shape of testimony given on behalf of the Hoboken Chamber of Commerce as to the importance of the Hoboken to that community, the industries and steamship piers served by it, etc. As to the Trunk Lines, it seems absurd to suggest that the Commission could not assume the importance to the public interest of the continued operation of the large trunk line and transcontinental roads handling this silk, such as the New York Central, the Erie, the Grand Trunk, the Union Pacific, etc. We do not believe the Court will hold that the Commission without evidence could not take judicial notice of this fact, or that it failed to give it due consideration.

Whether an Originating, Intermediate, or Delivering Line.

The remaining item specified is "whether any particular participating carrier is an originating, intermediate, or delivering line."

It certainly cannot be said that the Commission failed

to consider this item. The record on the original hearing shows (R. 113, 115, 125, 173) and the Commission found (R. 208) that the Hoboken was the delivering line as to silk; that the silk was imported through the Pacific Coast ports, that the carriers receiving the silk at those ports were the originating carriers, and that the other railroads bringing the silk across the country were intermediate carriers.

The fact that the Hoboken was the delivering line of the silk shipments was of especial importance since it was because of the services incumbent upon it as delivering carrier that the Hoboken incurred the expenses which it did. The context of the section supports the view that the Commission was entitled to base its determination to a large degree upon the fact of this terminal service and its consequent expense, without regard to the length of the Hoboken's haul compared with the total transportation service in connection with the silk shipments.

Any Other Fact.

Section 15 (6) then concludes with the requirement that the Commission consider "any other fact or circumstance" which would, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another.

The court below does not suggest what other factors should have been considered by the Commission under this language. It is plain, however, that the Commission did consider other factors. There is evidence in detail as to the way the silk was handled (R. 70-78, 85, 102-107), as to the expenses incurred by the Hoboken because of its service as the delivering carrier (R. 72-78, 191), as to the ter-

minal service of which the Trunk Lines were relieved by the Hoboken operation (R. 78-83), as to the divisions paid to the Hoboken on ordinary freight as compared to this extraordinary silk (R. 71, 119, 127) and as to the divisions paid to other terminal lines (R. 117, 126, 203).

All of these facts were before the Commission in the record at the first hearing.

We accordingly submit that since the issue before the Commission was the reasonable division to be received by the Hoboken out of a single and extraordinary rate on silk, there was sufficient evidence before the Commission bearing upon this issue to satisfy the requirements of Section 15 (6), and that it should not now be held that the Commission failed to comply with those requirements.

We also submit that the lower court erred in holding that the Commission's first determination and order were made "without any reference to the services performed by the trunk lines, or their condition, efficiency and need of revenue" (R. 41).

In considering the merits of the appellees' contention that the record on the original hearing was insufficient, it is significant that on the rehearing, the appellees and their connections produced little evidence, although the decision of this Court in *Brimstone R. R. Co.* v. *United States*, 276 U. S. 104, had been announced in the meantime and although the appellees made no serious contention that the record following the rehearing was insufficient to satisfy the requirements of Section 15 (6). The only additions to the record produced by the appellees and their connections as the result of the rehearing were, (1) a financial statement for the individual Trunk Lines containing information similar to that shown on the original hearing for the carriers in the different regions as

a whole (R. 339) and (2) a stipulation that "the complainants and defendants stipulated that they each of t' re-spectively are efficiently operated and are of impor to the public, and of such importance that their continued operation is in the public interest" (R. 256). If it is to be held that the Commission in making its original order failed to comply with the statute because such a stipulation was not made at the first hearing, it would certainly mean placing a highly artificial construction upon the language of the Act and sacrificing substance to form. We submit that in the absence of proof to the contrary, the Commission was entitled to assume without stipulation the existence of the facts stated therein.

D. To hold that in this case, involving the Hoboken's division of a rate on silk alone, this evidence failed to satisfy the requirements of Section 15 (6) would involve a disregard of the words "due consideration" and require an unreasonable construction of the statute.

The opinion of the lower court does not indicate clearly what additional evidence should, in its view, have been before the Commission to satisfy Section 15 (6). But after an examination of the evidence which actually was before the Commission on the first hearing, we submit that the fact that the lower court found this evidence insufficient leads necessarily to the inference that it was the court's opinion that regardless of the nature of the particular issues before the Commission or the character of the relief sought, and regardless of its relevancy to such issues, there must be before the Commission full evidence as to all of the factors specified, with respect to all traffic and with respect to each and every carrier party to the proceeding.

This, we submit, represents an erroneous view of the meaning of the statute.

What is "due consideration" in a particular proceeding must depend upon the nature of the issues which the Commission is called upon to decide and the character of the relief sought. It seems clear that little or no consideration can be "due" to factors which cannot by any stretch of the imagination aid the Commission in deciding the particular issues before it or affect its determination.

In the case of *Poland* v. *McDowell*, 114 Me. 511, 512, the trial court upon the plaintiff's request included the following instruction in his charge to the jury:

> "You are to give due consideration to all testimony that has been deemed admissible by the court."

Then the trial court added the following qualification:

> "That due consideration means that you are to consider it as far as it has any bearing as proving the issue in this case, and not as proving anything else."

The appellate court held that there was no error in this qualification.

In *Smyth* v. *Ames*, 169 U. S. 466, at pages 546 and 547, Mr. Justice HARLAN, in giving the opinion of this Court, after outlining the various factors affecting value, said that these factors

> "are to be given such weight as may be just and right in each case."

Since the principles outlined in this decision constitute an important part of the background of Section 15 (a) of the Interstate Commerce Act, where the words "due consideration" also appear, the language quoted is of especial interest here.

It is surely imposing an unreasonable construction on Section 15 (6) and one that would render its validity doubtful to hold that it requires that a complainant, as a condition to securing relief, must produce and that the Commission must have before it and consider evidence which cannot in any way aid it in determining the particular issue before it and which is not pertinent to the matter in hand.

For example, in a case involving the division of a single rate on a particular commodity, evidence as to the factors specified in Section 15 (6) can hardly be pertinent except as they may relate to the transportation of that commodity.

On the other hand, if a railroad or group of railroads is seeking a general revision of the divisions of all rates on all traffic interchanged with another railroad or group of railroads, then an inquiry into the general revenue needs of the different railroads, the efficiency with which their respective operations are as a whole conducted, and the relative importance to the public of the general transportation services performed by them, would be pertinent. Such were the facts in *Brimstone R. R. Co.* v. *United States, supra; United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274; and *New England Divisions Case, supra,* relied upon by the appellees in the court below and doubtless to be relied upon by them here.

Again, where the Commission is asked to revise the division to be received by a small terminal railroad out of a rate covering transportation entirely across the continent performed by a large number of railroads, evidence as to the general financial needs of each one of these railroads and evidence as to the efficiency of their respective general railroad operations or of their operations in the handling of some other kind of freight, can hardly be con-

sidered pertinent or helpful to the Commission. Thus it is difficult to see how the reasonableness of the division to be received by the Hoboken out of this particular through rate for the transportation of silk can in any way depend upon the general efficiency of operation of the Southern Pacific Railroad, for example, or the efficiency with which the Canadian Pacific Railroad, or any other of the great transcontinental systems over which silk is but one of thousands of commodities transported, handles coal, or iron, or fruit or any other freight, or upon the revenue required to meet taxes and operating expenses by the Santa Fe or the Grand Trunk or even the immediate connections of the Hoboken, such as the New York Central and the Erie.

If the Commission would not be aided in determining the issue before it by a consideration of these matters, then it is certainly putting a strained construction upon the language of the statute and ignoring the important words "*due* consideration", to hold that the statute nevertheless requires the Commission to consider and give weight to evidence as to these facts in such a case.

And if the Commission would not be required to give any weight to such evidence, it is putting an even more forced construction on the statute to say that nevertheless the evidence must be produced or the Commission may not act. It is, moreover, a construction which will render it difficult for a small terminal line to secure relief, since many of these matters are not within its knowledge and are difficult of proof by it.

We, therefore, submit that in determining the division of a single rate, Section 15 (6) should not be construed as requiring the Commission to have before it evidence as to the factors specified with respect to railroad operations as a whole and with respect to all railroads, but at most to

have evidence of the sort indicated by the items specified in so far as they relate to the handling of the particular commodity in question.

The contentions here made as to what constitutes "due consideration" of the factors specified in Section 15 (6) when the division of an individual rate is in issue find support in decisions relating to the determination of reasonable rates.

In *Beaumont, Sour Lake & Western Ry. Co.* v. *United States, supra,* this Court said, page 89:

> "The same rules as to pleading and proof apply to orders prescribing divisions as to laws fixing rates."

This Court has held that general matters such as financial needs, operating efficiency, or general public interest, are of little or no weight in determining the reasonableness of an individual rate and that these matters are important only when consideration is being given to a general readjustment of rates on all traffic. Thus in *Int. Com. Comm.* v. *Union Pacific R. R. Co., supra,* at page 549, the Court said:

> "Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article."

Again in *Dayton-Goose Creek Railway Company* v. *United States*, 263 U. S. 456, citing the last named case, the Court said at page 482:

> "It is argued that to cut down the operating profit of the stronger roads to a certain per cent. is not cutting or reducing rates, since the net income of a carrier has no proper relation to rates and cannot be used as evidence of their reasonableness. *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, and *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, are cited to this point. They merely decide that where the reasonableness of one rate or a class of rates is in issue, the total operating profit of the railroad or public utility is of little use in reaching a conclusion. This is shown by the words of Mr. Justice LAMAR, speaking for the Court, in *Interstate Commerce Commission* v. *Union Pacific R. R. Co.* (p. 549): * * *."

and again at page 483:

> "There is nothing in the act requiring the use of the net return as evidence to fix a particular rate."

In *Northern Pac. Ry. Co.* v. *North Dakota, supra*, at page 604, this Court said:

> "When the question is as to the profitableness of the intrastate business as a whole under a general scheme of rates, the carrier must satisfactorily prove the fair value of the property employed in its intrastate business and show that it has been denied a fair return upon that value."

But the Court went on to say that:

> "* * * where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it

for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into account the entire traffic to which the rate applies, it must be concluded that the State has exceeded its authority."

The precise question here under consideration, as to the extent and character of the evidence which must be before the Commission to satisfy the requirements of Section 15 (6) in a proceeding brought by a single terminal line to secure an increase in its division of one particular rate on a single commodity, has not heretofore been before this Court.

We submit, however, that the decisions of this Court in such cases as there have been, involving the Commission's authority to prescribe divisions of joint rates, not only afford no precedent for the interpretation of Section 15 (6) apparently placed upon it by the court below, but on the contrary support the contentions of the appellants as to the effect of Section 15 (6).

The first case of importance under this section of the Act subsequent to its amendment by the Transportation Act was *New England Divisions Case, supra.* This action involved a complaint to the Interstate Commerce Commission by the New England Railroads seeking increased divisions out of their joint through rates with their western connections.

The decision is important here because it indicates that Section 15 (6) of the Act is to be liberally construed to enable the Commission to carry out the broad purposes of the Transportation Act and to adjust earnings between carriers so that weak lines may continue to operate.

The decision is of further significance, moreover, in the

light of the apparent opinion of the court below that the Commission's order should be condemned because, as the court erroneously concluded, its determination was based largely upon the need of the Hoboken for additional revenue (R. 41). For if ever there was a case where the primary consideration of the Commission was the financial need of the petitioning roads, it was the *New England Divisions Case*, as the Commission's reports indicate, 62 I. C. C. 513, 66 I. C. C. 196, and yet the Commission's order granting them increased divisions was sustained by this Court.

The Commission's order in the *New England Divisions Case* was first challenged on the ground that "its purpose was not to establish divisions just, reasonable, and equitable, as between connecting carriers, but, in the public interest, to relieve the financial needs of the New England lines, so as to keep them in effective operation" (p. 189). The Court rejected the contention that this invalidated the order, holding that the purpose of the Transportation Act was to preserve transportation services in the public interest and that the Commission was entitled to increase divisions when this was needed to preserve a weak line for the public service.

It was next contended "that if the Act be construed as authorizing such apportionment of a joint rate on the basis of the greater needs of particular carriers, it is unconstitutional" (p. 195). The Court pointed out that there was no claim "that the apportionment results in confiscatory rates, nor is there in this Record any basis for such a contention." The Court sustained the Commission's action in the face of the objection, saying, among other things (p. 195):

> "'Cost of the service is one of the elements in rate making.'"

The Court also pointed out (p. 196):

> "The special needs of the New England lines were at all times before the Commission."

Finally the contention was made substantially the same as that made here that the order was unsupported by evidence required under Section 15 (6). This contention the Court rejected, Mr. Justice BRANDEIS saying (p. 203):

> "The contention that the order is unsupported by the evidence rests largely upon arguments which assume a construction of the statute which we hold to be erroneous, or upon expressions in the first report of the Commission, which, in view of the second report and order thereon, must be deemed to have been withdrawn. That the evidence was ample to support the order made, is shown in the opinion of the lower court, 282 Fed. 306, 308, 309, and in the reports of the Commission."

The next case to be considered is *United States, v. Abilene & Southern Ry. Co., supra,* commonly called the *Orient Divisions Case.* In that case this Court held the Commission's order invalid but did so upon grounds which cannot be urged against the order here under consideration: first, that in making its finding the Commission relied upon data in annual reports filed with it but not offered in evidence; and second, that there was no evidence of the individual rates or of typical rates to be divided but only evidence as to averages, which this Court held was not sufficient proof of the nature of the rates whose divisions were in issue. The conclusions of the Court, however, with respect to other objections raised to the validity of the Commission's order have a bearing upon the issues in the present case and support the contention here made for a practical construction of Section 15 (6).

Thus, after stating the substance of Section 15 (6), the Court said (pp. 284-285):

> "It is settled that in determining what the divisions should be, the Commission may, in the public interest, take into consideration the financial needs of a weaker road; and that it may be given a division larger than justice merely as between the parties would suggest 'in order to maintain it in effective operation as part of an adequate transportation system', provided the share left to its connections is 'adequate to avoid a confiscatory result'. *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 477; *New England Divisions Case*, 261 U. S. 184, 194, 195. It was not contended before the Commission that a reduction of the carriers' divisions would reduce their rates below what is compensatory. There is in the record no evidence on which it could be determined that any of the divisions ordered will result in confiscatory rates."

The last part of the language quoted is plainly applicable to the case at bar. If the Commission can give a division "larger than justice * * * as between the parties would suggest", it can surely prescribe a division which covers only the complainant's costs.

In answer to the objection that the Commission was guided solely by the relative financial ability of the several carriers, the Court said:

> "It does not follow that such a basis of division would necessarily be unjust to the connecting carriers. The position of the Orient as the originating carrier, or as the delivering carrier, or as an indispensable intermediate carrier, might be such that the connecting carrier could not get the traffic but for the service which the Orient renders; and that this factor, together with others ignored in the existing divisions, would require the precise change directed to render

the divisions just and reasonable as between the parties."

The third decision and the one most vigorously urged upon the court below is *Brimstone R. R. Co.* v. *United States, supra.* It was following the decision in that case that the Commission reopened the present proceeding for further consideration, because of the Court's holding that Section 15 (6) does not authorize the Commission to require a readjustment of divisions retroactively to the date of the filing of the complaint seeking a change in such divisions where the joint through rates to be divided have not been specifically prescribed by the Commission. However, besides dealing with the retroactive feature of the Commission's order in the *Brimstone* case, the Court passed upon questions which were raised as to the sufficiency of the evidence before the Commission to meet the requirements of Section 15 (6). While it was held in that case that the requirements of Section 15 (6) had not been satisfied, it is submitted that the decision affords no precedent for a similar decision here since there are very important differences in the facts of the two cases.

The *Brimstone* case involved a proceeding before the Commission not for the revision of a particular rate on a single commodity, but for a general revision of divisions of all rates on all freight. Moreover, it was not a proceeding which originated upon the complaint of a carrier or group of carriers asking increased divisions, but was a proceeding instituted by the Commission on its own motion to determine whether or not because of its excessive earnings, the shipper controlling the Brimstone was securing an undue advantage or rebate, and whether on this account revenue should not be taken away from the Brimstone and given to its connections through the medium

of decreasing the Brimstone's division of all of its joint freight rates and increasing the divisions of its connections. Since such was the purpose of the inquiry and since the proceeding did not arise from a claim by the Brimstone's connections that their divisions were inadequate, the Commission's attention was directed primarily to the question whether or not the Brimstone's divisions yielded it an excessive return. Having found that they did, the Commission made an order decreasing the Brimstone's divisions and increasing those of its connections without, so far as appears from the Commission's reports or the decision of this Court, having given any consideration to the character of the traffic involved, the measure of the through rates or the revenue needs of the carriers whose divisions were thereby increased. This Court held that the Commission had failed to give due consideration to the items specified in Section 15 (6), saying (p. 115):

> "The Commission evidently undertook to deprive the Brimstone Company of receipts supposed to exceed a fair return on its property and award the same to connecting carriers without evidence tending to show they were in need or had or would receive more or less than a fair return from agreed divisions, or that the joint rates themselves were unfair and unjust, or that the agreed divisions were 'unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers'."

We submit that a decision that the Commission in making an order under these circumstances failed to comply with Section 15 (6) is far from requiring the conclusion that the Commission in the present case likewise failed to comply with this section; nor, as we submit, is there

any language in the Court's opinion supporting such a view.

Since the decision of the court below, this Court has decided the case of *Beaumont, Sour Lake & Western Ry. Co.* v. *United States, supra.* In that case this Court upheld an order of the Commission in the face of the contention that the evidence was not sufficient to meet the requirements of Section 15 (6). The proceeding involved a general revision of the divisions on all freight, and therefore evidence as to general financial needs, revenues and operating conditions was more pertinent than in the case at bar. The opinion of the Court, however, supports the contention that a broad and practical interpretation should be given to Section 15 (6). Thus it was said that the Commission

> "need not under all circumstances take specific evidence as to each rate of every carrier" (p. 82).

We therefore urge that in determining whether the Commission has complied with the requirement that it give *due* consideration to the matters specified, attention must be given to the nature of the proceeding before the Commission, the character of the relief sought, and the extent to which a consideration of these matters may be relevant or helpful to the Commission in passing upon the particular issues before it, and that in the light of these considerations the evidence here was sufficient.

E. This contention is borne out by a consideration of the purposes of Section 15 (6).

In considering the construction to be placed upon Section 15 (6), sight should not be lost of the fact that the particular portion of this section here discussed was im-

ported into the Act by the Transportation Act of 1920 and was a part of the general scheme of Congress to confer broad powers upon the Commission to deal with railroad freight rates for the maintenance of an efficient transportation system for the country.

Prior to the Transportation Act, Section 15 of the Act to Regulate Commerce had conferred upon the Commission authority under certain circumstances to prescribe the just and reasonable proportion of a joint rate to be received by each carrier.*

The Transportation Act, however, gave the Commission broader powers in order "to insure * * * adequate transportation and services",

New England Divisions Case, supra, 191.

As this Court said in that case:

> "The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted: the group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. * * * The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable."

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*"Sec. 15. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof the Commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order * * *." (36 Stat. L. 551.)

The reports of the Commission indicate that under the former Act it had undertaken to prescribe divisions of rates on individual commodities in consideration of the circumstances surrounding the transportation of these particular commodities, similar to those considered here.

Stonega Coke & Coal Co. v. *L. & N. R. R. Co.*, 39 I. C. C. 523 (1916—coal and coke);
Cape Girardeau Portland Cement Co. v. *St. L. & S. F. R. R. Co.*, 47 I. C. C. 204 (1917—cement).

Considering the purpose of the Transportation Act, it is difficult to conceive that it was intended thereby to curtail the powers of the Commission to prescribe divisions of individual rates. As the Court said in the *Brimstone* case:

> "Section 15 (6) should be construed in the light of the recognized difficulties."

Authority to prescribe the division of rates solely in the light of the facts previously considered by it plainly would not enable the Commission to take care of weak roads nor to accomplish the purposes intended by the Transportation Act. For this reason Congress enacted Section 15 (6) in the language that it did (*New England Divisions Case, supra*). It is to be inferred that its purpose was not to narrow the authority of the Commission but to make it clear that in order to carry out the broad purposes of the Transportation Act, the Commission might readjust divisions of joint rates, not only on the grounds previously considered by it but also in the light of other and additional considerations which it specified when this should be necessary "for distributing the funds expected to be raised by the new rate-fixing sections".

Summarizing this point, we submit that if proper weight is given to the words "due consideration" as used in Section 15 (6), the statute requires evidence to be before the Commission as to the factors specified only to the extent that such evidence may be pertinent to the issue to be decided and that the evidence before the Commission on the original hearing satisfied this requirement, the proceeding involving the division of the rate on a single commodity only and the record containing evidence as to each of the specified factors with reference to the transportation of silk.

POINT II.

Since the Commission, in making its determination and order of November 5, 1927, complied with the requirements of Section 15 (6) with respect to the matters to be considered by it, its decision and order constituted a valid determination of the future just, reasonable and equitable division to be received by the Hoboken, and its order was a valid order in so far as it fixed the division to be received by that company on and after thirty days from its date, or December 5, 1927.

The second ground upon which the lower court held the Commission's order of November 5, 1927 invalid was that the Commission while prescribing the reasonable division for the future, also attempted to make its order relate back to August 6, 1926, the date of the filing of the Hoboken's complaint with the Commission. The Court below appears to have held that on this ground, as well as because

of the lack of evidence, the order was void in its entirety (R. 41).

We submit that although the retroactive feature of the order was void, the order and the decision constituted a valid determination of the division to be received by the Hoboken for the future and that it was therefore within the inherent authority of the Commission subsequently to correct its order of November 5, 1927 to read as it should have read originally, to give effect to its determination and speak only as to the future.

Had the appellees, immediately after the issuance of the Commission's first order, sought to have it enjoined, it is submitted that a court should properly have enjoined the enforcement of the order only in so far as it related to past shipments. It has been held that where a portion of an order of the Commission is valid and a portion is invalid, and the invalidity results from an error of law, a court will enjoin the invalid portion but will not enjoin or may indeed enforce the valid part of the order.

Int. Com. Comm. v. *Diffenbaugh*, 222 U. S. 42, 49.
Chicago & A. R. Co. v. *Interstate Commerce Commission*, 173 Fed. 930 (reversed on other grounds in *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452).

In *Chicago, M., St. Paul & P. R. Co.* v. *United States*, 33 Fed. (2d) 582 (D. C. N. D. Illinois) the court at page 589 said:

> "Congress, however, conferred upon the court jurisdiction to enjoin or set aside so much of an order as is invalid. The statute (28 U. S. C. A. Section 41 (28)) confers jurisdiction over all 'cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission'."

The Commission's report leaves no room for doubt that it intended to make a determination of the Hoboken's division for the future. All but the last paragraph of its first order speaks for the future (R. 213). There is nothing in the report indicating that its determination of a reasonable division for the future was conditioned upon or made only in consideration of the retroactive portion of the order. The determination of the division for the future was the important feature. The provision in the order attempting to render it applicable retroactively to August 6, 1926 is contained in a separate paragraph of the order from that prescribing the division for the future, and is plainly severable.

We therefore submit that the court below erred in holding that because the Commission attempted to make its order applicable retroactively to shipments moving after August 6, 1926, its determination and order of November 5, 1927 were null and void as to the future.

At most the effect of the invalidity of the last paragraph of the order was to render the order in its original form one issued without a valid effective date specified therein. If this is so, then we submit, as the Commission itself determined (R. 20), that the order became operative on the earliest date on which it could lawfully have been made effective, which under Section 15 (2) of the Act (see Appendix) was thirty days from its issuance, or December 5, 1927.

No cases have been discovered relating specifically to orders of the Interstate Commerce Commission issued without an effective date. However, in view of the fact that the function of the Commission in prescribing rates for the future has been held to be legislative in character, *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226, and the

same has been held with respect to the action of the Commission in determining the division of joint rates, *Terminal Railroad Assn.* v. *U. S.*, 266 U. S. 17, 30; it would seem that a strong analogy to the present situation is found in the cases involving statutes and executive proclamations. It has been held that a statute which does not within itself specify its effective date takes effect on the earliest date on which the legislature could have made it effective within the authority possessed by it under the Constitution. Thus where no time is expressly fixed by a general statutory or constitutional provision, a statute containing no provision as to its effective date takes effect upon its passage, *Matthews* v. *Zane*, 7 Wheat. (U. S.) 164, 211. In *State ex rel.* v. *Milroy*, 88 Ohio 301, it appeared that the Constitution of the State contained a provision that with certain exceptions, no law passed by the General Assembly should go into effect until ninety days after it should have been filed by the Governor in the office of the Secretary of State. The statute in question contained no effective date, but it was contended that it came within one of the exceptions and therefore it became effective immediately. The Court held that it took effect ninety days after filing by the Governor. In *Ross* v. *New England Mortgage Security Co.*, 101 Ala. 362, it appeared that the Code provided:

> "No penal act shall take effect until thirty days after the adjournment of the General Assembly at which such act was passed, unless otherwise specifically provided in the act."

The statute in question contained no provision as to its effective date and it was held that it took effect thirty days after the Assembly adjourned.

See also:

Payne v. *Graham*, 118 Me. 251;
Savage v. *State*, 18 Ala. App. 299;
In re General Appropriation Bill, 16 Colo. 539;
State v. *Hecker*, 109 Or. 520, 221 Pac. 808;
Simpson v. *Paddock*, 195 Mich. 581, 161 N. W. 898.

It is accordingly submitted that the court below erred in enjoining and annulling the order of November 5, 1927 in its entirety, and that it should have held that the Commission's decision and order constituted a valid determination of the division to be received by the Hoboken on and after December 5, 1927.

POINT III.

The Commission in making its order of May 7, 1929, fully complied with the requirements of Section 15 (6) of the Interstate Commerce Act as to the matters to be considered by it, and this order was amply supported by substantial evidence including sufficient evidence as to the matters referred to in said section.

It is unnecessary to argue this point, since it was the view of the lower court that when, on May 7, 1929, the Commission after a further hearing came to issue its second order, it had before it sufficient evidence to satisfy the requirements of Section 15 (6). It was apparently conceded by the appellees that the evidence taken upon the further hearing supplied any deficiencies which there may have been in the original record, and it appears from the opinion of the court below that its decision that the order of May 7, 1929 should be annulled was not predicated upon

an insufficiency of evidence but upon other grounds now to be discussed (R. 43).

POINT IV.

The Commission's order of May 7, 1929 properly amended its former order of November 5, 1927, so as to make the latter order effective December 5, 1927, instead of August 6, 1926.

Referring to the second order, the lower court in its opinion said (R. 43):

> "This order, as we view it, based upon the hearing which preceded it, might have fulfilled the intent of its makers, but for its retroactive features."

and again (R. 43):

> "We thus have presented a situation wherein an order, which by reason of its evidential background might, irrespective of all other considerations, have accomplished its purpose for the future, yet saddled with a proviso that its terms should become effective as of a date long preceding the taking of the testimony necessary for its being, and harking back to and attempting to revitalize a prior order which, builded on a faulty groundwork, was altogether null and void.
>
> It appears to us that the insertion of this retroactive provision has served to nullify and make void the Commission's second order of May 7, 1929."

It will be seen that the lower court's conclusion that the second order was invalid had for its premise the Court's opinion that the first order was void because of the insufficiency of the evidence on the original hearing. Whether,

if the premise was correct, the lower court was also correct in its conclusion as to the validity of the second order will be considered under the next point. But if, as we have contended, there was ample evidence on the first hearing to sustain the Commission's first order, and the Commission's first decision and order constituted a valid determination of the division to be received by the Hoboken for the period beginning 30 days after its date, then we submit that an entirely different question is presented, and that to hold the order of May 7, 1929 void as a retroactive order is to disregard the character of the proceedings.

The order of May 7, 1929, in so far as it was a retroactive order, was not an original order but by its very terms was an order correcting and amending its original order to read as the said order should have read when originally issued. We submit that it was clearly within the power of the Commission thus to correct its original order, and that such an order does not come within the language of the statute nor the principle announced by this Court in the *Brimstone* case rendering invalid an attempt by the Commission to give retroactive effect to an order prescribing divisions.

Section 17 of the Interstate Commeree Act (41 Stat. L. 492) provides:

> "(1) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

Section 16 (a) of the Interstate Commerce Act (34 Stat. L. 592) authorizes the Commission to grant rehearings and provides:

"if, in its judgment, after such rehearing and the

consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change or modify the same accordingly."

Section 16 (a) also provides that no application for rehearing

> "shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission."

Section 15 (2) likewise contemplates that the Commission may modify its orders, this section providing that its orders other than orders for the payment of money shall continue in force until its further order or for a specified period of time "unless the same shall be suspended or modified or set aside by the Commission."

These provisions relate to orders of the Commission in general and contain no language excepting orders as to divisions from their application.

The Commission's order reopening this case for rehearing did not contain a "special order" setting aside or suspending its order of November 5, 1927 (R. 214). This order therefore in so far as it was valid, remained in effect, and the Commission's determination continued to constitute a determination of the future division to be currently received by the Hoboken.

On the rehearing the Commission was convinced of the correctness of its previous determination and order prescribing the amount of the division to be received by the Hoboken, and therefore did not reverse, change, or

modify its original order in this respect. It recognized, however, that it had erred as a matter of law in providing that its original order should take effect as of August 6, 1926, and that the effective date of the original order should have been the earliest date upon which the order could have become effective under the terms of the Act, namely, December 5, 1927. It accordingly found that its original order should be corrected to provide that it should take effect on this date (R. 350, 351). Its order was therefore not in the terms of a new order but of an order correcting and modifying the previous order (R. 355) and, we submit, came within its authority under the provisions of the Act just quoted.

L. & N. R. Co. v. *Sloss-Sheffield Co.*, 269 U. S. 217; *Pennsylvania R. Co.* v. *United States*, 288 Fed. 88.

The argument that the second order was invalid as a retroactive order is based upon the language of Section 15 (6), but we submit that there is nothing in this language limiting the power of the Commission on a rehearing to correct an original order, or providing that every order fixing divisions which operates in any respect retroactively is invalid. The provision of this section as construed by this Court in the *Brimstone* case limits the power of the Commission to require a readjustment of divisions for the period between the time of the filing of the complaint and the announcement of the Commission's decision to instances where the Commission has itself prescribed the rate to be divided, but it does not take orders fixing divisions out of the general provisions of the Act nor provide that where the Commission has made a determination of a reasonable division and has made an order designed to enforce com-

pliance with the Commission's determination which is erroneous in form, such an order may not thereafter be corrected.

Moreover, the considerations which this Court in the *Brimstone* case outlined as reasons for limiting the authority of the Commission to compel a retroactive readjustment of divisions for a period prior to a hearing, do not apply to the period after a hearing has been held, after the Commission has considered the evidence, has found that the law is being violated and has announced its decision. Indeed, the second order was expressly designed by the Commission to make the first order conform to the views of this Court expressed in the *Brimstone* case.

The important consideration here is that the Commission's determination had been made and announced. The appellees and their connections were violating the law in not allowing a reasonable division to the Hoboken. The order was designed to compel compliance with the law and obedience to the Commission's determination. The error sought to be corrected by the order of May 7, 1929 was an error in the form of the order and not in the substance of the Commission's determination, and this error did not affect the fact that the appellees and their connections were violating the law which required them to accord to the Hoboken a just and reasonable division. Under these circumstances, we submit that it was error to hold that the Commission, after the rehearing, was without power by its order of May 7, 1929 to correct its order of November 5, 1927 to make that order read as it should have read when originally issued.

POINT V.

The order of May 7, 1929 was a valid order for the future.

If, contrary to the foregoing argument, this Court holds that the Commission was without power by its order of May 7, 1929, to correct its original orders and that the order of May 7, 1929 was invalid in so far as it attempted to do so, we submit that the order should nevertheless be held to have been a valid order with respect to the future, and that the court below erred in annulling and enjoining the order of May 7, 1929 in its entirety.

As has been pointed out, it is not contended and was not found by the court below that the evidence before the Commission as a result of the rehearing was insufficient to meet the requirements of Section 15 (6). The Commission therefore had the means of making a valid order for the future and for the reasons previously urged in Point II in support of a similar contention with respect to the first order, we submit that the order of May 7, 1929 should be held to be a valid order effective at least on and after June 5, 1929.

POINT VI.

The judgment of the court below should be reversed.

Respectfully submitted,

PARKER MCCOLLESTER,
Attorney for Appellant,
Hoboken Manufacturers'
Railroad Company.

APPENDIX.

The following portions of the Interstate Commerce Act, in addition to Section 15 (6), which has been quoted in full in the text, have been referred to:

Section 1 (4) (41 Stat. L. 474): "It shall be the duty of every common carrier subject to this Chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers."

Section 15 (2) (41 Stat. L. 484): "Except as otherwise provided in this Chapter, all orders of the Commission other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

Section 16 (a) (34 Stat. L. 592): "After a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein and it shall be lawful for

the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order."

Section 17 (1) (41 Stat. L. 492): "The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission may administer oaths and affirmations and sign subpoenas. A majority of the Commission shall constitute a quorum for the transaction of business, except as may be otherwise herein provided, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division of the Com-

mission, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any division thereof and be heard in person or by attorney. Every vote and official act of the Commission, or of any division thereof, shall be entered of record, and its proceedings shall be public upon the request of any party interested."

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